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IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. 7.

JOHN D. CONLEY, STANLEY MOORE, SR., GEORGE L. CARTER and B. A. WATSON,

Petitioners,

vs.

PAT J. GIBSON, General Chairman of Locals 6051 and 28, RAYMOND DICKERSON, Division Chairman of Locals 6051 and 28, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, A. F. OF L., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS PAT J. GIBSON, et al.

CLARENCE M. MULHOLLAND,
741 National Bank Bldg.,
Toledo 4, Ohio,
EDWARD J. HICKEY, JR.,
620 Tower Building,
Washington 5, D. C.

Of Counsel:

FULBRIGHT, CROOKER, FREEMAN,
BATES AND JAWORSKI,
Second National Bank Building,
Houston 2, Texas,
MULHOLLAND, ROBIE & HICKEY,
620 Tower Building,
Washington 5, D. C.

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BRIEF FOR RESPONDENTS PAT J. GIBSON, et al.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas (R. 19-24) is officially reported at 138 F. Supp. 60. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 29a) is reported at 229 F. 2d 436.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 31, 1956 (R. 30). A petition for rehearing filed on February 20, 1956 (R. 30) was denied on March 15, 1956 (R. 31). The jurisdiction of this Court was invoked under Section 1254 (1) of Title 28, United States Code, and a petition for writ of certiorari was granted by the Court on October 8, 1956 (R. 31).

RESTATEMENT OF QUESTIONS PRESENTED

Perhaps the most important single problem of this brief is to correctly state the issues involved. In view of what we regard as a grossly exaggerated statement of the questions presented by Petitioners in their brief to this Court, we are persuaded that precise clarification of the issues presented by the Complaint is of the utmost importance if academic argument is to be avoided upon racial discrimination questions which are here not actually involved. For this reason we trust the Court will indulge us in a more lengthy statement of the issues presented than is usually required.

Petitioners inform this Court that one of the questions presented is whether a Complaint by Negro members of a craft of railway employees states a claim against the bargaining representative for breach of the statutory duty of fair representation imposed upon such representative by the Railway Labor Act when it alleges that "the union *bars them* [the Negro members] *from membership in its local lodge* which carries on the collective bargaining process" (p. 3, italics supplied). Although the Complaint does allege (R. 9-10) that Respondent Brotherhood maintains two separate locals—one composed solely of Negro members (Local 6051) and the other solely of white members (Local 28)—and that plaintiffs have been compelled to join

Local 6051 solely because they are Negroes, there is no allegation that any of Petitioners or those whom they claim to represent have ever been denied the right to admission as a member of Local 28 or have even sought such admission. Moreover, there is also no factual support in the Complaint for the further inference, created by the question presented by Petitioners as above quoted, that the entire bargaining process is conducted by and solely on behalf of the white Local 28.

Petitioners also state that the Brotherhood "uses *its statutory position* to compel them to maintain membership in an inferior, racially segregated local" (p. 3, italics supplied). There is no factual allegation or legal basis for the statement that the Brotherhood maintains separate locals for white and Negro members as a result of or pursuant to any authority granted by statute. For reasons which we shall discuss in the Argument *infra*, the maintenance of segregated locals is not dependent upon or derived from the union shop provisions of the Railway Labor Act nor the union shop agreement made thereunder by the Brotherhood and the Railroad, and in the absence of any allegation that racial segregation is compelled *as a condition of continued employment* the Complaint fails to state a violation of either the statute or the agreement.

Proceeding further with Petitioners' statement of the issues to be determined by this Court, they state that the Complaint alleges that the Brotherhood "refuses to exert *any effort toward maintenance of the collective agreement* insofar as it pertains to the Negro members of the craft, *resulting in their loss of employment and employment rights*" (p. 3, italics supplied). The Complaint contains no such allegation. On the contrary, with the exception of the allegations

concerning the maintenance of segregated locals, it is directed to a specific claim of discriminatory action *by the Railroad* in abolishing certain jobs, which the Complaint does not allege *resulted from any conduct of the Brotherhood* but which it claims the Brotherhood should not have allowed "to transpire" and should have protested on behalf of Petitioners (R. 10-11).

It is clear from the foregoing that the issues which Petitioners seek to have this Court review *are not the issues presented by the Complaint in this case to the courts below.* This is the fallacy of Petitioners' brief to this Court. First, it presented as issues extravagant claims of racial discrimination by Respondents which the factual allegations of the Complaint do not support, and then it addresses itself to these specious issues as though they actually existed. We think a proper statement of the questions presented is as follows:

(1) Whether the allegations of the Complaint that Petitioners have been compelled to accept union membership in a segregated local lodge composed solely of Negroes, unaccompanied by any allegation that this is required as a condition of continued employment, state a violation of the Railway Labor Act;

(2) Whether the exclusive jurisdiction of the National Railroad Adjustment Board under the Railway Labor Act over employee grievances involving the interpretation or application of agreements concerning rates of pay, rules, and working conditions, can be successfully avoided by a litigant simply through the device of not naming the railroad as a party defendant and proceeding solely against the bargaining representative for alleged violation of its statutory duty of fair representation, even though the facts alleged by the Complaint assert wrongful application

of the agreement only by the Railroad, allege no violations of the agreement by the representative, and make only the claim that the representative failed to prevent the alleged discrimination by the Railroad and failed to protest such action as a grievance;

(3) Whether, under such factual allegations, the District Court and the Court of Appeals correctly held that under the Railway Labor Act and decisions of this Court a court lacks jurisdiction to entertain a complaint the *justiciable* facts of which allege racial discrimination by a railroad not in the terms or in the making of a collective bargaining agreement but solely because of its asserted unlawful application to Petitioners;

(4) Assuming, *arguendo*, that the District Court and not the Railroad Adjustment Board had jurisdiction over the subject matter of the Complaint, whether the judgment of dismissal was nevertheless correct because of the failure of the Complaint to state a claim upon which relief can be granted or because of the lack of an indispensable party defendant.

STATUTES INVOLVED

In their brief Petitioners state that Sections 2 Fourth, 2 Eleventh (a), and 3 First (i) of the Railway Labor Act, 45 U. S. C. 152 Fourth, 152 Eleventh (a), and 153 First (i), are particularly involved in the instant case. Respondents fail to see any relevance to any of the issues presented by this case of Section 2 Fourth, which grants to railroad employees the right to bargain collectively through representatives of their own choosing and grants to the majority of any craft or class of employees the right to determine its bargaining representative. The provisions of Section 2 Eleventh (a) and 3 First (i) are admittedly involved in the case, and these provisions of the Railway Labor

Act have been adequately set forth in Petitioners' brief.

RESTATEMENT OF THE CASE

Because in our view, as already demonstrated by our Restatement of the Questions Presented, Petitioners misstate the issues involved in this case by making extravagant claims of racial discrimination by the Brotherhood which the factual allegations of the Complaint do not support, we believe a careful analysis of the allegations of the Complaint is required. We believe, as did both courts below, that such an analysis of the Complaint fails to establish any violation by Respondents of their duty of fair representation admittedly imposed upon them by the Railway Labor Act but, on the contrary—with the single exception of the issue concerning the maintenance by the Brotherhood of racially segregated locals, which we shall show is not a justiciable issue—discloses only an alleged discriminatory application of the bargaining agreement by the Railroad and a lawful declination by the bargaining representative to protest such action to the Railroad and seek redress of Petitioners' alleged grievances.

1. The Complaint

The factual allegations of the Complaint (R. 3-16) may be summarized as follows:

Petitioners (plaintiffs below) are Negro employees of the Texas and New Orleans Railroad Company (herein referred to as the Railroad) and the Southern Pacific Transport Company (herein called the Transport Company), and are members of Local 6051 of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes. Petitioners instituted this suit on their own behalf and allegedly as representatives of other similarly situated

Negro employees of the Railroad and the Transport Company.

Respondents (defendants below) are labor organizations and officers thereof. The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (herein called the Brotherhood) is a standard international labor organization with its headquarters and principal place of business located at Cincinnati, Ohio, and is the duly selected and legally constituted bargaining representative of certain employees of the Railroad, including Petitioners. Locals 28 and 6051 are affiliated lodges of the Brotherhood whose membership is made up of employees of the Railroad. Pat J. Gibson is General Chairman of the Brotherhood on the Railroad and Raymond Dixon [1] is Division Chairman.

It is alleged that Local 6051 is composed solely of Negro members and Local 28 solely of white members; that Petitioners have been compelled to join Local 6051 solely because of their race and solely for the purpose of affording them representation inferior and different to that offered to members of the white race who are admitted to membership in Local 28; and that although the union shop provisions of the Railway Labor Act and a union shop agreement made by the Brotherhood with the Railroad pursuant to the statute both provide that union membership may not be required of employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other members, the segregation of Negroes into a separate local lodge constitutes a discriminatory denial to them of due process of law (R. 9-11).

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[1] Through error, Petitioners have designated Mr. Dixon in their Complaint as "Dickerson."

Since November 1, 1939, a collective bargaining agreement, entered into pursuant to the provisions of the Railway Labor Act [45 U. S. C. § 151 *et seq.*], has been in effect between the Railroad and the Brotherhood governing the rates of pay, rules, and working conditions of the employees of the Railroad represented by the Brotherhood (R. 11).

It is alleged that on May 1, 1954, the Railroad posted on the bulletin board at its Houston Freight House (where all the Petitioners were employed) a notice stating that approximately 45 jobs were being abolished. Petitioners believe, but do not allege as a fact, that only those jobs held by Negro employees were abolished. It is claimed that this notification was improper under the terms of the collective bargaining agreement (R. 11). However, the Complaint does not set forth either the terms or substance of the provisions of the agreement alleged to be violated. Indeed, since the Railroad was not made a party defendant, the Complaint is completely vague as to who Petitioners considered was required by the agreement to give proper notice of job abolishments.

The Complaint further alleges that Respondents did not inform Petitioners of the circumstances which caused the notice to be posted. The claim is made in general terms that Respondents "suffered" the abolishment of the jobs "to transpire without in any manner coming to the aid of plaintiffs and those whom they represent; and did decline to hear plaintiffs on this question of discharging repeatedly and without reason" (R. 11). Petitioners admit, however, that Respondents did inform them that the abolishment of the jobs and discharges were due to the leasing by the Railroad to the Transport Company of certain portions of the docks at the Houston Freight House, and

that there was nothing that could be done about it (R. 12).

It is further alleged that the jobs listed as having been abolished were not in fact abolished because persons were immediately hired by the Transport Company to perform them. The claim is made that many white men were hired to fill these jobs and that later on some Negroes, whose jobs had been abolished by the Railroad, were hired but without seniority—Petitioners apparently contending that the seniority rights acquired by the Negro employees of the Railroad should have been credited to them when they were hired by the Transport Company (R. 12).

There are other allegations to the effect that Negro employees of the Railroad have been displaced from permanent positions and placed on a so-called "Break Out" while this has not occurred to white employees, and that Petitioners believe that no white employees represented by the Brotherhood have been displaced. Petitioners aver in their Complaint that the foregoing acts "constituted a planned course of conduct designed to discriminate against them because of their race or color" (R. 12-13).

Declaratory and injunctive relief and damages in the amount of $75,000 are sought for alleged violations of Petitioners' rights under the Federal Constitution, the Railway Labor Act, and the collective bargaining agreement. Discovery by the court is sought of a lease between the Railroad and the Transport Company and the manner in which Petitioners' rights are affected by said lease. Discovery by the court is also sought of the manner in which the collective bargaining agreement between the Railroad and the Brotherhood "has been applied." A declaratory judgment is sought that the maintenance of a separate lodge for Negro members is illegal under the Railway Labor

Act. Injunctions are sought to restrain Respondents from requiring Petitioners to maintain membership in the Brotherhood by joining a segregated Negro lodge, from refusing to bargain for Petitioners on a basis equal to that afforded to the white employees, from refusing to protect Petitioners "from discriminatory action because of race or color from whatever quarter emanating," from permitting or engaging in any discrimination toward Petitioners, from "allowing" Petitioners' jobs to be abolished, from allowing their discharge or termination of their seniority, and from acting as the bargaining representative so long as "any acts of discrimination continue" and until Petitioners are accorded "equality of representation on any phase of labor negotiations" (R. 14-16).

2. Proceedings in and Action by the District Court and the Court of Appeals

As its responsive pleading to the Complaint, Respondents filed in the District Court a motion to dismiss the action (R. 17-18) upon the following grounds:

(1) that the District Court lacked jurisdiction over the subject matter of the Complaint because Congress in the Railway Labor Act has granted to the National Railroad Adjustment Board exclusive jurisdiction of issues involving the application or interpretation of collective bargaining agreements such as those upon which plaintiffs purport to base their claims;

(2) that it appears on the face of the Complaint that there is a defect of an indispensable party defendant because the Texas and New Orleans Railroad, which took the action of abolishing the jobs of which plaintiffs complain and is a party to the bargaining agreement upon which plaintiffs base their rights, has not been joined by plaintiffs;

(3) that the Complaint fails to present a justiciable issue with respect to its allegations concerning the maintenance by the Brotherhood of racially segregated locals; and

(4) that the Complaint fails to state a claim upon which relief can be granted.

On March 16, 1955, the District Court filed a memorandum opinion, 138 F. Supp. 60, in which it held that since the substance of the Complaint was a claim that Petitioners had been denied rights through alleged improper performance of a collective bargaining agreement, the court lacked jurisdiction. It specifically considered and rejected Petitioners' contention that the decisions of this Court in *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, and *Tunstall* v. *Brotherhood*, 323 U. S. 211, were applicable. It further held that because of lack of jurisdiction over the subject matter of the Complaint it was not necessary to discuss the other grounds upon which the Respondents had moved to dismiss (R. 19-24).

On March 21, 1955, the District Court entered its judgment granting defendants' motion to dismiss (R. 24-25), from which judgment Petitioners took an appeal to the United States Court of Appeals for the Fifth Circuit (R. 26).

On January 31, 1956, the United States Court of Appeals affirmed the judgment of the District Court (R. 29a), 229 F. 2d 436. A judgment was entered on January 31, 1956 (R. 30), and a petition for rehearing was denied on March 16, 1956 (R. 31).

SUMMARY OF ARGUMENT

Petitioners claim in this case that the Brotherhood has violated its duty under the Railway Labor Act of fair representation as established and delineated by

this Court in the *Steele*, *Tunstall*, *Graham*, and *Howard* cases, and abused its statutory position and power, and their brief is addressed exclusively to this proposition. Respondents contend that the facts alleged in the Complaint of misconduct by the Brotherhood do not support this claim as a matter of law, and that the dismissal of the action by the courts below should be affirmed.

In our view, the issues as framed by Petitioners are misstated in many respects and cannot be supported by the factual allegations of the Complaint. In substance these issues, as well as the prayers for relief set forth in the Complaint, seek determination by this Court of abstract questions of racial discrimination.

The factual allegations of the Complaint actually boil down to two separate and unrelated claims: (1) that the Brotherhood is violating the Railway Labor Act, and specifically the union shop provisions thereof, by its maintenance of separate locals which are segregated as between Negro and white members; and (2) that the Brotherhood's failure to prevent, protest, or redress certain alleged discriminatory action by the Railroad in abolishing a number of jobs previously held by Petitioners and curtailing their seniority rights constitutes a breach of the bargaining representative's duty under the Railway Labor Act to represent all members of the craft fairly and without discrimination because of race or color.

1. Our contention in opposition to Petitioners' first claim concerning the maintenance of racially segregated locals is that in the absence of any alleged deprivation of employment such action by the Brotherhood does not violate the Railway Labor Act and fails to present a justiciable issue. The legislative history of the Union Shop Amendment to the Railway Labor

Act clearly supports our contention. Congress was specifically requested to provide that a union which segregates members into separate locals is not entitled to any of the benefits of the statute. It expressly refused to do so and restricted the protection afforded under the union shop provisions to protection of the employe's job. Moreover, in deciding the *Steele* case, this Court recognized that the Railway Labor Act does not deny to a labor organization "the right to determine eligibility to its membership." In its consideration of the proposed Union Shop Amendment to the Railway Labor Act, Congress was also asked to provide that any union shop agreement entered into by a labor organization which denied membership to Negroes would be unlawful. Congress also refused to make this requirement. Further, the claim made in Petitioners' brief that solely because of their race the union "bars" Petitioners from membership in the white local is completely unsupported by any factual allegations in the Complaint. There is no allegation that any of Petitioners have been denied admission to the white local or that any of them have ever sought to obtain admission as members therein.

2. Petitioners' second claim that Respondents were obligated by the fair representation requirements of the Railway Labor Act to either prevent the Railroad from abolishing certain of Petitioners' jobs or to protest and redress such action is untenable as a matter of law. In substance, the factual allegations of the Complaint, which are unfairly described by Petitioners as a planned course of conduct designed to discriminate against Petitioners because of their race or color, are limited to action exclusively by the Railroad in abolishing certain of Petitioners' jobs and curtailing their seniority rights, in none of which the Brotherhood is alleged to have participated, agreed to,

assisted in, conspired for, known about, or done anything more than "suffered" such action by the Railroad "to transpire" and "did not come to the aid" of Petitioners after the Railroad had acted. We do not think that such conduct or omission by the Brotherhood constitutes either hostile discrimination because of race or color or an abuse of its statutory authority and power as claimed by Petitioners.

Specifically, the doctrine of the *Steele*, *Tunstall*, *Graham*, and *Howard* decisions of this Court predicated jurisdiction in the federal courts to redress discrimination by a bargaining representative under the Railway Labor Act in the making of agreements upon the exclusive authority and power of such representative under the statute to fix the terms of such agreements for all members of the craft without their consent. But such exclusive authority does not extend to the handling of claims of individuals based upon alleged breaches of agreements which have been negotiated pursuant to the statutory authority. This Court has expressly so held in *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U. S. 711, aff'd on reargument, 327 U. S. 661. Although the bargaining representative may represent individuals with respect to their grievances if they are found to have merit, it is not required to do so since it cannot, without the individual's consent, bind him, and the individual further has the clear right under the statute to resort in person to the Adjustment Board for the redress of such grievances.

3. The lower courts were correct in holding that Petitioners' claims concerning job abolishments and curtailment of seniority were in substance, though not in form, grievances within the exclusive jurisdiction of the National Railroad Adjustment Board. Whether or not Petitioners' claims amount to a violation of their rights under the collective bargaining agreement

as asserted in the Complaint, obviously requires interpretation of the bargaining agreement. In fact, Petitioners specifically request such construction in their Complaint and also ask for construction of the lease-agreement between the Railroad and the Transport Company insofar as that agreement affects their rights as employees. Aside from the fact that the Railroad is clearly an indispensable party defendant to any such determination, the courts below correctly held that such determinations were within the exclusive jurisdiction of the National Railroad Adjustment Board.

We view as untenable Petitioners' conclusion that the specific factual grievances of the complaint could be "adjudicated without in any manner considering whether or not there was in fact a breach of the collective bargaining agreement by the carrier." If such a contention were true, it would necessarily mean that the District Court could find the Brotherhood guilty of a breach of its statutory duty to represent fairly without first determining whether the action of the Railroad, which Petitioners assert the Brotherhood should have prevented and protested, was a violation of the collective bargaining agreement. Moreover, such a conclusion of Petitioners clearly demonstrates that their objective here is to obtain a holding that a bargaining representative must process on behalf of Negro employees any grievance regardless of its merits. The holdings of the courts below are completely compatible with the conclusions of the United States Court of Appeals for the Ninth Circuit in *Hayes* v. *Union Pacific R. Co.*, 184 F. 2d 337, wherein it was held that the District Court correctly dismissed as outside its jurisdiction a complaint against both the railroad and the bargaining representative seeking redress for breaches of a collective bargaining agreement upon facts substantially identical

with those here involved. With specific reference to the claim against the bargaining representative, the court held that the only claim against it amounted to a charge of "failure to prevent" alleged discriminatory practices of the railroad. This Court denied certiorari in the *Hayes* case, 340 U. S. 942.

For the above reasons, Petitioners' claims amount either to a failure to state a cause of action against Respondents or they constitute grievances which are within the exclusive jurisdiction of the Railroad Adjustment Board.

ARGUMENT

Although Petitioners' brief argues that the Complaint states a cause of action against the Brotherhood for violation of its duty under the Railway Labor Act of fair representation as established and delineated by this Court in the *Steele, Tunstall, Graham,* and *Howard* cases,[2] and abuse of its statutory position and power, we contend that the *facts* alleged in the Complaint of misconduct *by the Brotherhood* do not support this claim as a matter of law.

We wish to protest and prevent if we can any use of this case as a vehicle for abstract determination of a series of racial discrimination issues which we respectfully submit are not presented on this record. This Court has repeatedly advised litigants that it will not judicially determine abstract questions or grant declaratory or injunctive relief upon a hypothetical set of facts framed for the purpose of invoking the advice of the Court without a real case between the parties having adverse legal interests of certainty and immediacy. *Liberty Warehouse Co.* v. *Grannis,* 273 U. S.

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[2] *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944); *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 330 U. S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1953).

70; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288; *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, *reh. den.* 300 U. S. 68[illegible]; *Coffman* v. *Breeze Corporations*, 323 U. S. 316, 318, 323-324; *United Public Workers* v. *Mitchell*, 330 U. S. 75, 88-89. We believe that Petitioners' brief flies in the face of this well-established doctrine by seeking to have the Court rule on a series of abstract racial discrimination issues which actually have no support in the factual allegations of the Complaint insofar as the Brotherhood's conduct is concerned. In part this has been accomplished through misstatement of the issues involved and through an exaggeration of certain of the facts alleged in the Complaint as we have already shown in our Restatement of the Questions Presented *supra*. In part it has been accomplished by the sweeping and abstract character of the prayers for relief set forth in the Complaint as distinguished from the actual conduct of the Brotherhood as it is factually related.

It can be argued that the prayers for relief, or the issues as framed by Petitioners in their brief, state a cause of action cognizable by the District Court if the allegations of the Complaint *factually* establish that the Brotherhood has done the things or been guilty of the conduct sought to be enjoined. But that is not the case. For example, Petitioners seek an injunction against any further bargaining by Respondents on their behalf until they are accorded equality of representation "on any phase of labor negotiations" (R. 16). If there were some specific allegation in the Complaint that Respondents had discriminated against Petitioners in the conduct of labor negotiations in a particular situation, unquestionably this would be subject to remedy by injunction under the doctrine of the *Steele* case. But the Com-

plaint contains not a single allegation that the collective bargaining agreement between the Railroad and the Brotherhood is discriminatory or illegal in any of its provisions or that it was illegally entered into by the Brotherhood or the Railroad, and this fact appears to be conceded in Petitioners' brief to this Court.

The prayers for relief also seek to enjoin Respondents from "permitting" any discrimination toward Petitioners "from whatever quarter emanating," from "allowing" their jobs to be abolished, and from allowing their seniority to be terminated on account of race or color (R. 15). Clearly, in the absence of allegations that the Brotherhood has participated in such acts of discrimination, or conspired with someone to bring them about, or acceded to its perpetration upon Petitioners, the relief sought against the Brotherhood is not warranted. Nowhere in the Complaint is it alleged that Respondents conspired or participated in any discussions with the Railroad regarding the abolishment of the 45 jobs Petitioners allege they have lost, or that Respondents in fact took any action in the alleged deprivation of Petitioners' rights under the bargaining agreement. The only specific acts alleged to have been committed by Respondents are that they did not prevent the jobs from being abolished or protest their abolishment to the carrier.

In short, with the single exception of the allegations of the Complaint concerning the maintenance of a separate Negro lodge by the Brotherhood—which we shall shortly show fails to state a justiciable issue—the only acts of discrimination alleged by the Complaint appear to be on the part of the Railroad, and the remedy by way of declaratory judgment and injunction should have been sought against it. In the absence of some factual allegations of involvement by the Brotherhood in the discrimination of which Peti-

tioners complain, we do not believe that it can lawfully be required to prevent such conduct by others. Although their duty of fair representation certainly includes the obligation to act in good faith for all members of the craft which they represent, whether they be white or colored, we do not believe the Railway Labor Act or the Constitution exact the obligation for which Petitioners contend in this case. Specifically, we do not believe that the Railway Labor Act requires a labor organization to redress grievances of individual employees which it may conclude are lacking in substance or merit either with the carrier or before the Railroad Adjustment Board for the reason that the Railway Labor Act expressly gives this right to the individual himself in the event his bargaining representative either declines to act on his behalf or is not authorized to do so. This proposition will be discussed in more detail *infra*.

We shall first discuss the allegations of the Complaint that the maintenance by the Brotherhood of racially segregated locals is a violation of the Railway Labor Act and should be so declared and enjoined.

I

IN THE ABSENCE OF ANY ALLEGED DEPRIVATION OF EMPLOYMENT, THE MAINTENANCE BY THE BROTHERHOOD OF RACIALLY SEGREGATED LOCALS DOES NOT VIOLATE THE RAILWAY LABOR ACT AND FAILS TO PRESENT A JUSTICIABLE ISSUE.

One example of Petitioners' efforts to obtain an abstract determination by this Court is afforded by their allegations concerning the maintenance by the Brotherhood of racially segregated locals. Insofar as the *factual* allegations of the Complaint are concerned, they state that the Brotherhood maintains two separate locals for various purposes of collective bargaining for employees who work at the Houston Freight House of the Railroad; that Local 6051 is composed

solely of Negro members and Local 28 is composed solely of white members; and that Petitioners have been compelled to join Local 6051 solely because of their race and for the purpose of affording them inferior and different representation than that afforded to the white members of Local 28 (R. 9-10).

These are all the factual allegations of the Complaint relating to the racially segregated locals. In order to properly present to the Court the issue of law which such factual allegations raise, we believe the differences should be noted between these facts concerning the Brotherhood's conduct as they are alleged and the way in which they are expanded by Petitioners to frame the issue which they assert is raised, and also the manner in which Petitioners' prayers for relief on the segregation issue go beyond the facts alleged.

As to the framing of the issue, Petitioners state in their brief to this Court that the Complaint alleges that "solely because of their race, the union bars them from membership in its local lodge which carries on the collective bargaining process," and "uses its statutory position to compel them to maintain membership in an inferior, racially segregated local" (Pet. Br., p. 3).

As we have already noted in our Restatement of the Questions Presented *supra*, there is no allegation in the Complaint which supports the statement in the Petitioners' brief that the "union bars them from membership" in local 28, nor any factual allegation that it has used "its statutory position to compel them to maintain membership" in Local 6501. There is no allegation in the Complaint that any of the Petitioners have been denied admission to Local 28 or that any of them have ever sought to obtain admission as members therein. Nor is there any claim made in the Com-

plaint that the Brotherhood has deprived any of the Petitioners of employment or attempted to make their membership in a segregated local a condition of continued employment, without which action there is no justification for the claim that the Brotherhood's maintenance of separate locals is pursuant to or dependent upon its statutory authority.

Similarly, the prayer for declaratory judgment by Petitioners in the Complaint (pp. 5-6) seeks to improperly relate the maintenance of separate locals to the union shop provisions of the Railway Labor Act by requesting determination of whether Petitioners "can lawfully, under the terms of the union shop contract of March 1, 1952, which provides for compulsory union membership, be compelled to accept membership in said union on terms different from that which is applicable to persons or employees of the white race of the same class" (R. 5-6). The prayers for relief also request that a declaratory judgment be granted holding that "the segregation of Negro employees of the craft represented by the Brotherhood into a separate local is illegal under the National Relations Act [sic][3] and is contrary to the Union Shop Agreement of March 1, 1953," and further seek an injunction enjoining the Brotherhood from "requiring plaintiffs to maintain membership in the union by joining Local 6051 the segregated local" (R. 15).

As we shall show, in the absence of any factual allegations that the Brotherhood has deprived any of Petitioners of employment for failure to join the segregated local or compelled them to maintain membership in such local *as a condition of continued employment*, these prayers for relief involving the statute

[3] Petitioners clearly mean the Railway Labor Act and not the National Labor Relations Act which, of course, is inapplicable to railroad employees.

present an abstract issue for determination by the Court which is not justiciable.

We urged in the courts below that the allegations of the Complaint concerning the issue of racially segregated locals failed to present a justiciable issue. We make the same contention here. In support of this contention we wish to emphasize first, that quite apart from the requirements of any provisions of law, or specifically the Union Shop Amendment to the Railway Labor Act, and dealing solely with the issue of whether segregation is in fact compelled as asserted by Petitioners, we repeat that there is no allegation that any of Petitioners have been denied membership in Local 28 or that any of them have sought such membership. Second, we submit that the Railway Labor Act does not prohibit the maintenance of racially segregated locals by a union organization. In fact, the Railway Labor Act does not prohibit total exclusion from membership of Negroes by railroad unions. Third, we submit, contrary to the argument advanced by Petitioners in their brief (pp. 10-11), that the legislative history of the Union Shop Amendment to the Railway Labor Act plainly discloses that its restrictions and conditions were directed solely to deprivation of employment and that an effort to have them extended to prevention of segregated locals was expressly rejected by Congress.

In the case of *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, this Court recognized that the Railway Labor Act does not deny to a labor organization "the right to determine eligibility to its membership" (p. 204). The union involved in the *Steele* case, by its Constitution and Ritual, excluded all Negroes from membership (p. 194). While that is not the situation in the instant case, and the Brotherhood of Railway and Steamship Clerks by its Constitution does admit

to membership both white and Negro, it follows from the quoted statement in the *Steele* case that maintenance of seperate locals for white and Negro does not violate the Railway Labor Act.

When the Union Shop Amendment to the Railway Labor Act was before Congress, it made no change in the law as declared by this Court in the *Steele* case.

Congress was expressly requested to provide that a union *which segregates members into separate locals*, or excludes any member of a craft from membership on the grounds of race, creed, or color, is not entitled to act as representative of the craft under the Railway Labor Act and is not entitled to any of the benefits of the statute.[4] Congress was also asked to provide that any union shop agreement entered into by a labor organization which denied membership on the basis of race, color, or creed would be unlawful.[5] Congress saw fit not to do so. Instead, it restricted the protection afforded under the amendment to protection of employees' jobs.

The report of the House Committee considering the union shop bill, H. R. Rep. No. 2811, 81st Cong., 2d Sess. (1950), states (p. 5):

> "The statutes of some labor organizations subject to the Railway Labor Act establish qualifications for membership which cannot be met by some employees, or provide for denial of, or expulsion from, membership on grounds other than failure to tender periodic dues, initiation fees, and assessments. The proviso clauses in paragraph

[4] Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7789, 81st Cong., 2d Sess. (1950), pp. 294-295, 285-286; Hearings before Senate Sub-committee of the Committee on Labor and Public Welfare on S. 3295, 81st Cong., 2d Sess. (1950), pp. 301-302, 244-245.

[5] House Hearings, p. 274; Senate Hearings, p. 237.

eleventh (a) are designed to protect such employees. Thus, if an employee is denied membership, or is eligible for membership only on terms and conditions not generally applicable to other members, *he cannot be required to relinquish his job because of his failure to join a labor organization.*" (Italics supplied).

Similarly, the report of the Senate Committee, Sen. Rep. No. 2262, 81st Cong., 2d Sess. (1950), states (pp. 3-4):

"During the course of the hearings before the subcommittee evidence was introduced showing that the constitutions of some labor organizations established qualifications for membership which cannot be met by some railroad employees. The proposal was made by Senator Lehman that your committee's intention be made clear that *such employees were not to be deprived of their employment* as a result of the exercise of the right extended by this bill. Your committee desires to make it clear that the proviso clauses in paragraph eleventh (a) are designed to protect such employees; thus if an employee is denied membership *or is eligible for membership only on terms and conditions not generally applicable to other members, he cannot be requested to give up his job because of his failure to join a labor organization.* Furthermore, if membership is denied or if an employee is expelled from membership for any reason other than his failure to tender the uniformly required periodic dues, initiation fees, and assessments, *he cannot be required to relinquish his job because of his failure to join or remain a member of a labor organization.* Your committee also desires to make it clear that nothing in this bill is intended to modify in any way the requirement that the authorized bargaining representative shall represent all the employees in the craft or class, including nonunion employees as well as members of the union, fairly, equitably, and in good faith. See Steele v. Louisville & Nashville

Railroad Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, and Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187." (Italics supplied.)

Accordingly, the question of whether the Railway Labor Act precludes respondents from requiring Petitioners to join a racially segregated local is not properly before this Court as a justiciable issue unless the terms of the union shop agreement entered into between the Brotherhood and the Railroad provide for termination of Petitioners' employment for reasons other than those expressly allowed by Congress, or the agreement is sought to be applied so as to result in such termination. It is undisputed that the union shop agreement entered into by the Brotherhood and the Railroad contains no provision in violation of Petitioners' rights under the statute. In fact, the limitations on the requirement of union membership which are contained in the agreement are virtually in the language of the Union Shop Amendment to the Railway Labor Act. This is conceded in paragraph VII of the Complaint which quotes the applicable language in both the union shop agreement and the statute (R. 10). Section 4 of the union shop agreement provides in pertinent part as follows:

> "Nothing in this agreement shall require an employee to become or to remain a member of the organization if such membership is not available to such employee upon the same terms and condition as are generally applicable to any other member . . ." (R. 10).

Consequently, since the Complaint contains no allegations whatever of any action taken by Respondents to terminate employment of any of Petitioners, and since the action of the Brotherhood in the maintenance of racially segregated lodges or locals, apart from any

effort to make such membership a condition of continued employment, does not constitute a violation of law, the issue presented by Petitioners is not justiciable. See *Taylor v. Brotherhood of Ry. & Steamship Clerks, etc.*, 106 F. Supp. 438 (D. C. Dist. of Col., 1952).

II

THE ALLEGATIONS OF THE COMPLAINT CONCERNING ABOLISHMENT BY THE RAILROAD OF CERTAIN OF PETITIONERS' JOBS AND THE FAILURE OF RESPONDENTS TO PREVENT OR PROTEST SUCH ACTION DO NOT CONSTITUTE A VIOLATION OF THE BAGAINING REPRESENTATIVE'S STATUTORY DUTY OF FAIR REPRESENTATION.

Apart from the allegations of Petitioners' Complaint concerning the maintenance by Respondents of racially segregated lodges, the remaining factual allegations of the Complaint boil down to a claim that Respondents were obligated by law to either prevent the Railroad from abolishing certain of Petitioners' jobs or to protest such action once it was accomplished. The factual allegations of the Complaint are completely vague as to what provisions of, or in what manner, the bargaining agreement was violated by the Railroad when it abolished the particular jobs in question, and equally vague as to how Respondents could have prevented such action by the Railroad or successfully protested it. Petitioners presumably are contending that because Respondents did neither of these things they abused their statutory authority as representative of the craft including Petitioners and failed in their obligation to represent them fairly. We submit that when the claimed breach by the Brotherhood of its statutory duty of fair representation is limited to the factual allegations of the *Brotherhood's conduct* —as it must be to state a justiciable controversy—Petitioners' contention fails to state a claim against Respondents upon which relief can be granted.

In this connection, it deserves to be noted at the outset of this discussion that whatever may be claimed as

to Respondents' statutory obligation with respect to the job abolishments by the Railroad, there is certainly no warrant nor any supporting factual allegations for Petitioners' contentions in their brief to this Court that such omission by the Brotherhood "constituted a planned course of conduct designed to discriminate against Petitioners and those similarly situated solely because of their race or color" (Pet. Br., p. 5), or for the statement that the Brotherhood "refuses to exert any effort toward maintenance of the collective agreement insofar as it pertains to the Negro members of the craft" (p. 3), or for the statement that the alleged failure of the Brotherhood to act, rather than the action of the Railroad, "resulted in" Petitioners' "loss of employment and employment rights" (*ibid*). In contrast to the sweep of these statements, which certainly infers a continuing course of discriminatory conduct and a series of deliberate acts by Respondents to deprive Petitioners of any representation or benefits under the collective bargaining agreement, the *facts* in the Complaint are directed to a very specific grievance. There are no factual allegations that it ever happened before, or that it happened pursuant to an agreement between the Railroad and Respondents, or that in similar circumstances the jobs of white employees were protected while those of Negroes were not, or that apart from this single alleged violation of the agreement by the Railroad any other benefits of the bargaining agreement have been denied to Petitioners.

Reduced to its essentials, as shown in detail by our analysis of the allegations of the Complaint, *supra*, pp. 6-10, Petitioners' claim amounts to the following: The Railroad abolished approximately 45 jobs held by Petitioners. The basis for doing so was that it had leased the docks on which these jobs were performed to the Southern Pacific Transport Company, alleged

by Petitioners to be the Railroad's wholly owned subsidiary. The Transport Company then hired its own employees to perform the jobs. Some of the employees hired were those whose jobs had been abolished, including some of the Petitioners but without seniority. Petitioners had no previous notification from the Railroad, which they allege was required under the collective bargaining agreement, of the job abolishment until the Railroad posted a notice stating that approximately 45 jobs were being abolished. Respondents allowed these discharges "to transpire" and "did not come to the aid" of Petitioners (R. 11). Although it is also alleged that Respondents declined to hear Petitioners on the question of these discharges and did not attempt to apprise them of the reason why they had occurred, it is admitted in the Complaint that Respondents did inform Petitioners "that the said abolishing of jobs and discharging was due to the leasing of certain portions of the docks at the Houston Freight House by the T. & NO. Railroad Company to the Southern Pacific Transport Company and that there was nothing that could be done" (R. 11-12).

This is the sum total of the Brotherhood's action which the Complaint concludes constituted a planned course of conduct designed to discriminate against them because of their race or color and which Petitioners assert is an unlawful abuse of statutory position and power by the Brotherhood and a breach of its duty of fair representation under the Railway Labor Act. In support of this position, Petitioners principally rely upon this Court's decisions in the *Steele*, *Tunstall*, *Graham*, and *Howard* cases.[6]

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[6] *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944); *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 330 U. S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1953).

We submit that the basis upon which this Court in these cases predicated jurisdiction in the federal courts was the statutory fiduciary duty of the bargaining representative under the Railway Labor Act to represent in collective bargaining all those for whom it acted without hostile discrimination because of race or color. This obligation is not expressly stated in the Railway Labor Act but was implied by the Court as an essential concomitant of the bargaining representative's exclusive position and power under the statute to fix the terms of employment of minority members of the craft without their consent. Accordingly, we think the conclusion is justified that in all of these cases this court has held that the duty of the bargaining representative was predicated on, and co-extensive with, *its exclusive authority under the statute*.

There is thus no question of the statutory representative's exclusive authority and obligation with respect to bargaining for rates of pay, rules, and working conditions, but *such exclusive authority* does not extend to the handling of claims of individuals based upon alleged breaches of agreements which have been negotiated pursuant to the statutory authority. This Court has expressly so held in *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, aff'd on reargument, 327 U. S. 661. In that case the Court carefully delineated the scope of the representative's statutory authority under the Railway Labor Act to bind individual employees, and it clearly held that such authority did not extend to the administration of agreements or bind individuals as to their grievances or claims of violations of the agreements, but was limited to the resolution of so-called "major disputes" involving the making of agreements with the carrier. The Court did not hold that the bargaining representative could not represent individuals with respect to their grievances—and in most cases, of course, the bar-

gaining representative does so—but it did hold that the representative had no statutory power to bind the individual with respect to his grievances under the agreement and that the individual had the clear right to resort in person to the Adjustment Board for redress of such grievances.

Consequently, we submit that the "fiduciary duty" concept of the *Steele* and *Tunstall* cases, which was predicated upon the existence of exclusive authority in the bargaining representative to bind the individual employee in contract negotiations with the carrier, cannot be extended to the field of policing or administering agreements and redressing individual grievances. In short, if the exclusive authority to act does not exist, neither does the obligation.

It is not necessary for us to take issue with the position repeatedly urged by Petitioners in their brief to this Court that the duty imposed upon the bargaining representative by the Railway Labor Act is not limited to the making of a contract but is co-extensive with the total authority and power given the representative by the statute (Pet. Br., pp. 7, 10, 11, 12, 14). Like so many of Petitioners' prayers for relief, as previously demonstrated, and like so many of the contentions in their brief, the proposition is an academic one which seeks determination of an abstract issue of law unless and until it is related to a specific factual situation. Such a specific factual demonstration of abuse of statutory power and authority is clearly spelled out in the *Steele*, *Tunstall*, *Graham*, *Howard*, and other Negro discrimination cases upon which Peti-

tioners rely. In all these cases the conduct of the bargaining representative was clearly marked as depriving Negro employees of the benefits which were extended to white employees solely because of race or color.

But what is the situation here? Insofar as the factual allegations of the Complaint inform us, there was no agreement made by the Brotherhood with the Railroad to abolish jobs of Negro employees, or to discriminate in rehiring with respect to seniority rights, or to bring about displacement of Negro employees from permanent jobs, or to compel Negroes hired by the Transport Company to join another union. There is no claim that the Brotherhood conspired with the Railroad to bring about such a result. There is no charge that the bargaining representative suggested any of the action that the Railroad took, that it had any participation in it, or that it was even consulted by the Railroad (R. 11-13).

Consequently, *what specific conduct by the Brotherhood* discriminated against Petitioners in favor of white employees and thus constituted a breach of its statutory duty of fair representation? Petitioners claim that the Brotherhood "abnegated" its statutory duty by "refusing to represent them [Petitioners] within the collective bargaining process" (Pet. Br., p. 12). But this generalized conclusion in the specific factual setting here involved necessarily means that the Brotherhood is required to assert to the Railroad that its action of job abolishment was illegal under the collective bargaining agreement regardless of what the Brotherhood thinks of the merits of such a claim. It

further presupposes that if such a protest is unsuccessful with the Railroad, the Brotherhood must carry the matter further, presumably as a grievance to the National Railroad Adjustment Board. Obviously this is the only representation which the Brotherhood could possibly undertake in connection with actions by the Railroad of which complaint is made in the instant case.

Accordingly, the principle of law which Petitioners are asking this Court to declare is that if at any time a railroad dismisses Negro employees and these employees claim that such dismissals were motivated solely because of their race or color, the bargaining representative must protest the action and process it as a grievance before the Adjustment Board whether or not it agrees that the carrier's action violates the collective bargaining agreement. We do not believe that the duty of fair representation under the Railway Labor Act imposes such an obligation.

It is readily apparent that a requirement that a bargaining representative process all employee grievances would result in a chaotic situation. Should such a theory prevail, the bargaining representative would be in the hopeless position of having to handle to a conclusion, through the grievance machinery and to the Railroad Adjustment Board, each and every claim of the thousands of employees in the craft irrespective of their merit and regardless of their consistency from the point of view of interpretation of the provisions of collective bargaining agreements. The bargaining representative would find itself urging one interpretation to the Board one day and another the next, so that uniform interpretation and application of the agreement would become impossible.

The Supreme Court of Rhode Island dealt with an issue virtually identical with the one now under dis-

cussion in *Cabral* v. *Molders Union*, 82 R. I. 178, 106 A. 2d 739. In that case the plaintiff brought suit for damages against his collective bargaining representative, alleging as unlawful the union's refusal to process plaintiff's grievance, as a result of which he lost his employment. In sustaining the defendant's demurrer for failure to state a cause of action, the court said (p. 741):

> "In our view the declaration itself does not set out in terms any definite promise, undertaking or agreement by defendant to act for or on behalf of plaintiff or to perform any contractual duty for him in the circumstances alleged. Further, Article VI, Section 1, of the agreement deals only with the procedure to be taken in case of grievances thereunder. Nothing in the section has been brought to our attention which requires the union to act in such matters. Also plaintiff is authorized to deal directly with the employer if he wishes. No agreement, promise, or contract on the part of the union in respect to acting for plaintiff or on his behalf appears to be contained in Article VI as supporting any contractual duty owed to him by defendant.
>
> "The matter of seniority is covered by Article IV, Section 1. No promise, agreement or contractual duty on the part of the union for plaintiff's benefit is provided for in that article. If any difficulty occurs in agreeing on that subject it is to be taken up under the grievance procedure in Article VI hereinbefore referred to. Under Article X the employer agrees that it will not discharge the employee without 'just cause' which is defined in part in that article. Likewise there is no reference in Article X to any promise, undertaking or contractual duty entered into by the union for plaintiff's benefit.
>
> "It would appear therefore from the declaration itself, which includes and is based on the provisions of the agreement between the employer

and the union, that such provisions are largely procedural in nature under which plaintiff as an employee and member of the union acts alone, and that the union has made no promise, undertaking or agreement to act on behalf of plaintiff respecting the matters involved herein. In our opinion therefore there was no error in the ruling of the trial justice sustaining the demurrer."

For the foregoing reasons, we submit that Petitioners have failed to establish that the Brotherhood's failure to prevent, protest, or seek redress of the alleged discriminatory action of the Railroad constitutes abuse of Respondents' statutory authority or a breach of its duty of fair representation, and thus the Complaint fails to state a claim against Respondents for which relief may be granted.

III

THE HOLDINGS OF THE LOWER COURTS ARE CORRECT THAT PETITIONERS' CLAIMS CONCERNING JOB ABOLISHMENTS AND CURTAILMENT OF SENIORITY WERE IN SUBSTANCE, THOUGH NOT IN FORM, GRIEVANCES WITHIN THE EXCLUSIVE JURISDICTON OF THE NATIONAL RAILROAD ADJUSTMENT BOARD.

The courts below regarded the Complaint as in substance one necessarily involving the interpretation or application of the collective bargaining agreement in effect between the Railroad and the Brotherhood, and as one which, though not in form, in fact really presented a dispute between the Railroad and the Petitioners. Reference to the allegations of the Complaint clearly substantiates such a conclusion.

The collective bargaining agreement in question has been in effect since November 1, 1939. The parties to the agreement are the Railroad and the Brotherhood. The allegations of the Complaint that Petitioners' rights under this agreement have been violated necessarily involves an interpretation of its provisions. This would not only affect the rights of all employees

covered by the agreement and Respondent Brotherhood but it would also substantially affect the rights of the Railroad.

As a matter of fact, Petitioners request in their Complaint an interpretation of the bargaining agreement in effect between the Railroad and Respondents as requiring notification to Petitioners in advance of proposed job abolishments by the Railroad (R. 11, 14-15). The Complaint also requests a construction by the Court of the lease agreement between the Railroad and the Transport Company insofar as that agreement affects their rights as employees (R. 14). Obviously, any judgment which Petitioners could obtain in this case would have to proceed upon a construction of both the provisions of the bargaining agreement and the lease in order to determine whether the Transport Company could or could not hire certain individuals and whether the Railroad could or could not effectuate its lease agreement with the Transport Company by abolishing positions of persons employed by the Railroad on the leased property.[7]

The courts below properly concluded, we believe, that these determinations were not theirs to make, but were within the exclusive jurisdiction of the Railroad Adjustment Board. It has been well settled since this Court's decision in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, and *Order of Railway Conductors* v. *Southern R. Co.*, 339 U. S. 255, that cases involving the interpretation or application of collective bargaining agreements are within the exclusive jurisdiction of the National Railroad Adjustment Board, and that such jurisdiction may not be invaded by either the state or federal courts. We do not understand Petitioners to

[7] For these reasons, Respondents included as one ground of their motion to dismiss the failure to name the Railroad an indispensable party defendant to the action.

contest this point of law, as such, but they seek to avoid application of the doctrine in this case on the ground that the only issue here sought to be determined is "whether there was a breach by the Brotherhood of the statutory duties imposed upon it to represent all members of the craft fairly and to refrain from using its statutory position and power to discriminate against Negro members of the craft" (Pet. Br., p. 14).

We cannot agree with Petitioners' conclusion that the specific factual grievances of which they complain could "be adjudicated without in any manner considering whether there was or was not, in fact, a breach of the collective bargaining agreement by the carrier" (Pet. Br., p. 14). To do so would not only ignore large portions of Petitioners' prayers for discovery, declaratory, and injunctive relief, but it would necessarily mean that the District Court could find the Brotherhood guilty of a breach of its statutory duty to represent fairly without first determining whether the action of the Railroad, which Petitioners assert the Brotherhood should have prevented and protested, was a violation of the collective bargaining agreement. Such a conclusion by Petitioners clearly demonstrates that their objective here is to obtain a holding that a bargaining representative must process on behalf of Negro employees any grievance regardless of its merits. We have already stated our reasons why we do not believe the Railway Labor Act imposes such an obligation on the bargaining representative.

Finally, we respectfully submit that the holdings of the courts below are completely compatible with the conclusions of the United States Court of Appeals for the Ninth Circuit in *Hayes* v. *Union Pac. R. Co.*, 184 F. 2d 337, a decision on which the District Court below principally relied, and one in which this Court denied certiorari, 340 U. S. 942? In this case a group of Negro

employees alleged that the collective bargaining representative and the Railroad had violated the Railway Labor Act by administering a collective bargaining agreement so that the Negro employees were discriminatorily denied the promotions and seniority assignments to which they were entitled.[2] The Negro plaintiffs, as here, sought an injunction and other equitable relief, and the defendants moved to dismiss for lack of jurisdiction of the subject matter and failure to state a claim upon which relief may be granted. In affirming the judgment of the District Court granting defendants' motion to dismiss, the Court of Appeals stated the question raised by the appeal as being whether the District Court has jurisdiction under the Railway Labor Act of an employee's complaint charging racial discrimination in the performance of a collective bargaining agreement (p. 337). In answering this question in the negative, the Court said (p. 338):

> "It is not necessary to state in detail the nature of the affidavits and of the pleadings constituting the record which the trial court had before it. These matters are fully set forth in the opinion of Chief Judge Michael J. Roche, the trial judge. D. C., 88 F. Supp. 108. We adopt his opinion. We add to it only to the extent of saying that it is clear to us that the Federal Courts are not charged by federal law with the duty or function of policing the parties in the performance of collective bargaining agreements entered into pursuant to the Railway Labor Act. Congress did not, by the Railway Labor Act, grant jurisdiction to the Federal Courts to afford relief for breaches of performance of collective bargaining agreements. Appropriate tribunals have been established for that purpose. 45 U. S. C. A. § 153; National Railroad Adjustment Board; Slocum v. D. L. & W. R. Co., 339 U. S. 239, 70 S. Ct. 577. It is only when

[2] For the detailed facts see the District Court's opinion, 88 F. Supp. 108 at 109.

collective bargaining agreements are unlawfully entered into or when the agreements themselves are unlawful in terms or effect that federal courts may act. This is made quite clear by the Supreme Court in Steele v. L. & N. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173 and Tunstall v. Brotherhood, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187. The disposition of the cause made by the District Court is correct."

In the *Hayes* case before the District Court, as in the instant case, the plaintiffs argued that their complaint charging deprivation of seniority rights solely because of race or color was not subject to determination by the Railroad Adjustment Board but was cognizable by the federal district court by virtue of this Court's holdings in the *Steele* and *Tunstall* cases. In response to this contention, Chief Judge Roche said in part (88 F. Supp. 108, 109-110):

"Respondents have filed certain motions to strike and have moved to dismiss the action on the grounds of (1) failure to state a cause of action upon which relief may be granted and (2) lack of jurisdiction of the Court over the subject matter. In resisting these motions the petitioners rely entirely on the decisions of the Supreme Court in Steele v. Louisville & N. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, and Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210, 65 S. Ct. 235, 89 L. Ed. 187 . . . The fundamental question of jurisdiction thus depends on whether the record before this Court discloses a factual situation within the scope of the cited authorities. The Steele and Tunstall cases, supra, involved collective bargaining agreements that were discriminatory by their terms. There is no allegation in the present case that the collective bargaining agreement executed by Union and Railroad on June 1, 1942, and still in effect, discriminates against petitioners. They allege, instead, that discrimination has been effected by the

conduct of the respondents under the agreement, and contend that this is sufficient, under the Supreme Court decisions, to give this Court jurisdiction. The alleged discrimination arises in connection with respondent Railroad's seniority assignments and promotions.

* * *

"Turning now to the Steele and Tunstall cases, supra, upon which the petitioners ground their right of action, we find certain points of similarity and one of vital difference. In those cases the petitioners were Negro firemen employed by the respondent railroads, whose established practice was to promote only white firemen to engineers. The respondent Brotherhood, which excluded Negroes from its membership, was the authorized, exclusive bargaining representative of the craft of firemen employed by the railroads. The Brotherhood and the railroads entered into agreements restricting the seniority rights and the employment of Negro firemen, without giving them prior notice or opportunity to be heard.

* * *

"The Railway Labor Act is not a Fair Employment Practices Act. It imposes no duty upon the employer to act without discrimination, nor do the Steele and Tunstall cases, supra, so hold. . . . It is to be observed that while the facts of those cases were that the employer railroads practiced discrimination in the assignment and promotion of employees, and that the union Brotherhood practiced racial discrimination in its membership, the Supreme Court did not extend its ruling to include such practices in the prohibited area, but limited the rule to contracting and collective bargaining by the bargaining representative. Any doubt on this point was removed by the Supreme Court itself in Graham v. Brotherhood of Locomotive Firemen and Enginemen, 338 U. S. 232, 70 S. Ct. 14, 17, where the Court, referring to the Steele and Tunstall cases, supra, said: 'We held there that, as the exclusive statutory representative of the em-

tire craft under the Railway Labor Act, the Brotherhood could not bargain for the denial of equal employment and promotion opportunities to a part of the craft upon grounds of race.' "

Having thus disposed of the defendant railroad in the *Hayes* case, Chief Judge Roche then directed his attention to the allegations of the complaint that the bargaining representatives had violated its statutory duty of fair representation under the Railway Labor Act within the holdings of this court in the *Steele* and *Tunstall* cases. With respect to this contention, the court concluded (pp. 110-111):

"In the Steele and Tunstall cases, supra, the bargaining representative had made contracts which clearly violated this described duty. In the instant case neither the original complaint nor its amended forms contain any allegations that the respondent Union has violated this duty through collective bargaining or contracting. The sole allegation made against the Union is that it has acted 'in connivance' with the Railroad in the practices allegedly committed by the Railroad.

"An examination of the word 'connivance' shows its definition to be: 'corrupt or guilty assent to wrongdoing, not involving actual participation in it, but knowledge of, and failure to prevent or oppose it.' Webster's New International Dictionary; 'an agreement or consent, indirectly given, that something unlawful shall be done by another.' Bouvier's Law Dict., Rawle's Third Revision; 'Connivance with others may be committed by passive permission, or failure to prevent, of helping by not hindering when it is one's duty to prevent, or by negligence or voluntary oversight.' Brandon v. Holman, 4 Cir., 41 F. 2d 586, 588. This word cannot, without severe strain, be taken to mean 'participation through contracting.' Simply stated, the complaint alleges only that the Union has permitted, *through failure to prevent*,

> the existence of the alleged discriminatory practices of the Railroad." (Italics the Court's.)

We think the foregoing observations by Chief Judge Roche have particular application here since the most that can be said of Petitioners' allegation of wrongful conduct by Respondents is their "failure to prevent" the alleged discriminatory practices of the Railroad.

It is to be noted that this Court denied certiorari in the *Hayes* case (340 U. S. 942) although the petition for certiorari pointedly made the contention, advanced here by Petitioners, that the decision of the Ninth Circuit was in conflict with the decisions of this Court in the *Steele* and *Tunstall* cases.

The issue in the *Hayes* case and applicable law are thus almost identical to those in the instant case, with the single exception that in the *Hayes* case plaintiffs brought suit against the railroad as well as the bargaining representative and alleged that the Brotherhood had acted in connivance with the railroad in the discriminatory practices, which is not alleged here. Petitioners in the instant case seek in their brief to make much of the point that this is a dispute between Petitioners and their bargaining representative and does not involve or concern the Railroad. But the short answer to this contention is that obviously the basic and substantive nature of the cause of action cannot be so easily changed so as to vest the courts with jurisdiction through the simple tactic of omitting an indispensable party defendant. Moreover, the decisions of the district court and the Court of Appeals in the *Hayes* case pointedly bring out that there is a lack of jurisdiction in the courts as to either the Brotherhood or the Railroad to redress asserted unlawful application of a collective bargaining agreement.

CONCLUSION

For the foregoing reasons, Respondents contend that the District Court properly dismissed the Complaint either for failure to state a claim upon which relief may be granted against the Brotherhood or for lack of jurisdiction over the subject matter, and that the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

CLARENCE M. MULHOLLAND,
741 National Bank Bldg.,
Toledo 4, Ohio,

EDWARD J. HICKEY, JR.,
620 Tower Building,
Washington 5, D. C.

Of Counsel:

FULBRIGHT, CROOKER, FREEMAN,
BATES AND JAWORSKI,
Second National Bank Building,
Houston 2, Texas,

MULHOLLAND, ROBIE & HICKEY,
620 Tower Building,
Washington 5, D. C.